

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7127

United States Court of Appeals

FOR THE SECOND CIRCUIT

JACKSON O. KING,

Plaintiff-Appellee,

—against—

DEUTSCHE DAMPFES-GES,

*Defendant and Third-Party
Plaintiff-Appellee-Appellant,*

—against—

INTERNATIONAL TERMINAL OPERATING CO. INC. and
COURT CARPENTRY & MARINE CONTRACTING COMPANY,
Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT
INTERNATIONAL TERMINAL OPERATING CO. INC.**

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issue Presented	3
Facts	3
POINT I—	
The Court below erred in failing to dismiss plaintiff's complaint and the third party complaint by reason of a failure of proof	5
CONCLUSION	8

CASES

Avena v. Clauss & Co., 504 F.2d 469	6, 7
Mitchell v. Trawler Racer, Inc., 362 U.S. 539	7
Nuzzo v. Rederi A/S Wallenco, 304 F.2d 506	5, 7

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BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT INTERNATIONAL TERMINAL OPERATING CO. INC.

Preliminary Statement

This is an appeal from a judgment filed in the United States District Court for the Southern District of New York on January 20, 1975. The judgment awarded plaintiff the sum of \$42,900.00 against the defendant ship owner and in turn granted the defendant-third party plaintiff judgment over jointly and severally against International Terminal Operating Co. Inc. (hereinafter ITO) and against co-appellant Court Carpentry & Marine Contracting Co. (hereinafter Court Carpentry). After a trial before the

Honorable Constance Baker Motley the jury answered special questions finding that the vessel was unseaworthy and that plaintiff had proved that such unseaworthiness was the proximate cause of his injuries and that plaintiff was entitled to an award of \$57,200.00 reduced by his 25% contributory negligence to \$42,900.00 (476, 477).^{*} After further instructions by the Court the jury answered further special questions with regard to the claims for indemnity by the vessel against ITO and Court Carpentry. The jury found that ITO breached its implied warranty of workmanlike service and this was a proximate cause of the plaintiff's injuries. It also found that the vessel owner had not sustained its burden of proving that Court Carpentry breached its implied warranty of workmanlike performance (490, 491).

In post trial motions by ITO and the vessel owner, ITO moved for an order dismissing the indemnity award against it on the ground that there was insufficient evidence of its breach of workmanlike performance. That motion was denied. The defendant vessel owner moved for a judgment notwithstanding the verdict for indemnity against Court Carpentry on the ground that the jury's finding of contributory negligence by the plaintiff entitled it to judgment against Court Carpentry, plaintiff's employer, as a matter of law. That motion was granted and resulted in the entering of the judgment over by the vessel owner for indemnity jointly against ITO and Court Carpentry.

^{*} Numbers in parentheses refer to page numbers of original trial transcript.

Issue Presented

1. Did the Court below in failing to dismiss plaintiff's complaint and the third party complaint as a matter of law because of a failure of proof of unseaworthiness?

Facts

On June 18, 1968 plaintiff a marine carpenter employed by Court Carpentry reported for work at the defendant's vessel at Pier 3 Erie Basin, Brooklyn, New York. At about 10:30 A.M. plaintiff and another man, Grover Perry, were told by their foreman Auletti to go down into a hatch to lash some crane booms. When plaintiff got off the ladder and put his feet on the cargo he found that there were I-beams or H-beams covering the deck. These beams, about 12 inches wide and two feet high, were loaded side by side parallel to the long axis of the vessel. The crane booms to be lashed were loaded on top of the beams leaving an aisle about 3 feet wide running to the aft end of the hatch. Plaintiff, carrying a roll of wire on his shoulder walked to the aft end and was turning to go to the side of the ship to lash the booms when he fell in a hole (51). Plaintiff first described the hole as being one between the wall and the beams (53) then, in response to a somewhat leading question from his counsel, said that the hole was between the beams (53). The beams upon which he was walking were flat on top and each about fifty feet, nearly as long as the hatch (83, 84).

Andrew Auletti, plaintiff's foreman, testified that he sent plaintiff and Perry into hatch #4 which he knew contained steel beams which had previously been loaded by ITO. Before ordering the men into the hatch he had not himself

gone into it (139). After plaintiff's injury he went into the hatch and saw the place of the fall. He described it as a space about 5 or 6 inches between the beams (141). He did not go into the hatch to observe the space but indicated that he could see it from the top of the hatch (112). He described the job of the lashers and carpenters to secure cargo for the voyage. He described the procedure as follows: the lashers are sent down first to lash down the steel with $\frac{5}{8}$ " wire and a turnbuckle. Then the carpenters are sent down to place chocks in the spaces in the steel not eliminated after the lashing (157). In the course of such work he indicated that it was not unusual for the men to come upon spaces in the cargo and that this would be an expected condition (157, 160). Plaintiff and Perry had been sent down to the hatch for the purpose of lashing (160).

At another point in his testimony Auletti said that if a "good" gang was doing the loading they would keep the beams together otherwise they would be left with spaces between (159). He had seen beams "tight together" many times before (171-2).

At the close of plaintiff's case counsel for the vessel, ITO and Court Carpentry all moved to dismiss the complaint for failure to prove the only cause of action therein, unseaworthiness (271). The motion was based upon the contention that mere evidence of a space in the cargo did not make the vessel unseaworthy. These motions were denied (260), but the Court heard further argument thereon at the close of the vessel's case. After having Auletti's testimony re-read the Court ruled that there was evidence from which the jury could find that the beams had been improperly stowed and therefore denied the motions to dismiss the plaintiff's complaint (316, 317).

Counsel for ITO then moved for a dismissal of the third party complaint against it on the ground that there had

been no proof of its breach of workmanlike performance to the vessel owner. The Court also denied that motion when counsel for the vessel indicated that he was relying upon the testimony adduced by plaintiff through Auletti of an improper stow as proof of a breach of workmanlike performance by ITO (318, 320).

Similar motions were made after the jury's verdict and were similarly denied by the Court in its post trial decision. Appellant ITO appeals from the judgment entered upon the post trial decision.

POINT I

The Court below erred in failing to dismiss plaintiff's complaint and the third party complaint by reason of a failure of proof.

In *Nuzzo v. Rederi A/S Wallenco*, 304 F.2d 506, this Court said at page 510: ". . . it does not follow that unseaworthiness results from lack of an unbroken wall-to-wall flooring at each successive level in a lumber stow." Plaintiff Nuzzo sued the ship for injuries sustained while he was working in the wings of a vessel loading bundles of lumber into a sling for off-loading from the ship. The lumber had been placed in the vessel much as the steel beams had been in the case at bar parallel with the long axis of the hold forming a floor. On top of that floor another was laid and so on until the hold was filled. The lumber was tied in bundles of equal thickness and the bundles were stowed so as to form successive floors. At the fore and aft bulkheads of the hatch there were void spaces left by reason of ribs of the vessel which served to strengthen the bulkhead. As Nuzzo stepped back to maneuver a bundle into position on a sling he stepped into an empty space between the vertical ribs of the bulk-

head and fell backward. His claim was that the void space was a dangerous and unseaworthy condition. The case, similarly to the one at bar, was tried solely on the issue of unseaworthiness. In deciding the case the Court said that the issue was whether or not plaintiff made out a case of improper stowage. Plaintiff attempted to prove his claim of improper stow through another longshoreman who said that after fifteen years experience in unloading lumber the only hole he saw was the hole into which plaintiff fell. He said "we always find holes if it is not properly stored." (page 508). However, in responding on cross-examination to the question, "it was a good lumber stow, wasn't it? but you saw it?", Durante testified in the affirmative. This Court held that there was neither finding nor proof of facts upon which the conclusion of unseaworthiness by the trial court could have been based. In dismissing plaintiff's complaint this Court said that no case of improper stow could be based upon testimony that in the stowage of lumber holes are "the customary condition on every ship in the world," and that he "wouldn't consider it dangerous" (511). Such evidence the Court concluded could not be evidence of an unseaworthy stow of lumber.

Compare the foregoing to Auletti's testimony at bar. He said that it was not unusual to find spaces and that such was an expected condition (160). It is clear that the spaces in such a stow were common since after the lashers were finished, carpenters would customarily be sent in to chock the spaces. At best his testimony was that he had seen beams tight together on other occasions. However, there was absolutely no evidence, taking the whole of Auletti's testimony, that the stow violated the usual and customary standards of comparable maritime activity.

The case of *Avena v. Clauss & Co.*, 504 F.2d 469, cited by the Court below, is not contrary to the principle of

Nuzzo. There, this Court held, over a dissent, that a longshoreman with thirty-one years of experience had sufficient expertise to testify as to the custom of longshoremen moving cargo by means of inserting their hooks into the metal straps wrapped around cartons. The features that distinguish *Avena* from the case at bar are two; (1) Auletti's testimony did not establish that the custom and practice was to stow steel beams together without holes since he admitted that holes were to be expected and were not unusual, and (2) Auletti was a marine carpenter and not a longshoreman, whereas in *Avena* the expertise as to custom and practice was given by a longshoreman.

The District Court held that behavior at issue was the stevedore's stowage of steel beams with knowledge that others would be walking upon them. In determining whether the surface thus formed was reasonably fit for its intended use the Court failed to take into account that the surface thus formed was not intended solely for walking upon. It was not the top deck as in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, but a cargo area. ITO's witness Pinto testified that three or four inch spaces would be left between the beams as a result of having to leave space for the removal of chains (193). There was nothing to indicate that it was unreasonable as a matter of law to leave such spaces. Auletti testified that although he had seen beams tight together before he also expected spaces in such cargo and in fact it was the job of his men to fill such spaces. Under the circumstances his testimony should not have been taken as admissible proof as to good stevedoring custom and practice.

CONCLUSION

The plaintiffs complaint and the third party complaint should have been dismissed for failure of proof.

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Brief is admitted this

24th day of March 1975

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